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9 **UNITED STATES DISTRICT COURT**

10 **NORTHERN DISTRICT OF CALIFORNIA**

11 **SAN JOSE DIVISION**

12 SECURITIES AND EXCHANGE
13 COMMISSION,

14 Plaintiff,

15 vs.

16 SMALL BUSINESS CAPITAL CORP.;
17 MARK FEATHERS; INVESTORS PRIME
FUND, LLC; and SBC PORTFOLIO FUND,
LLC,

18 Defendants.

19 Case No. 5:12-CV-03237-EJD

20 **PLAINTIFF SECURITIES AND
EXCHANGE COMMISSION'S
OPPOSITION TO DEFENDANT MARK
FEATHERS [PROPOSED] AMENDMENT
TO AMENDED TEMPORARY
RESTRAINING ORDER AND ORDERS
[Dkt. No. 109]**

21 Date: February 22, 2013
22 Time: 9:00 a.m.
23 Place: Courtroom 4, 5th Floor
(Hon. Edward J. Davila)

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28 PLAINTIFF'S OPPOSITION TO DEFENDANT'S
PROPOSED AMENDMENT TO AMENDED TRO
[Dkt. No.109]

Case No. 5:12-CV-03237-EJD

1 **I. INTRODUCTION**

2 Defendant Mark Feathers filed four motions to amend the Court’s temporary restraining
 3 order (Dkt. Nos. 109, 110, 111, 112). The Securities and Exchange Commission (the
 4 “Commission”) addresses and opposes the first of these motions (Dkt. No. 109), which appears
 5 to seek two forms of relief, based on the proposed order submitted with the pleading: (1)
 6 payment of unspecified amounts of attorney fees to unidentified counsel from the legal fee
 7 reserve account the Court ordered the Receiver to create in its Order Denying Request for Legal
 8 Expenses (Dkt. No. 70); and (2) a stay preventing the Receiver from disposing of any assets or
 9 entering into any “material binding obligations” without further Court order. (See Motion (Dkt.
 10 No. 109) at pp. 23-24.)

11 To the extent Feathers is seeking modification of the Amended Temporary Restraining
 12 Order, his motion is moot since he consented to entry of a Preliminary Injunction (see Dkt. Nos.
 13 29, 34), which among other things appointed Thomas A. Seaman as permanent receiver over
 14 defendants Small Business Capital Corp. (“SB Capital”), and two funds its manages, Investors
 15 Prime Fund, LLC (“IPF”) and SBC Portfolio Fund, LLC (“SPF”) (collectively, the “Funds”).

16 Feathers’ request for payment of attorney fees was also fully addressed by the Court in
 17 its Order Denying Request for Legal Expenses and it is unclear what additional relief Feathers is
 18 seeking at this time. Feathers provides no basis for the Court to alter or amend its prior Order.

19 Finally, Feathers’ request to stay the Receiver from disposing of any assets or income of
 20 the Funds, or enter into any material binding obligations, is moot because the Receiver operates
 21 at the direction of the Court and, to the Commission’s knowledge, seeks approval from the Court
 22 for any such actions. Feathers also asks the Court to stay the receiver’s forensic audit work
 23 (Motion at 8:1-2, 9:27-10:1), to which Feathers previously consented in connection with the
 24 Preliminary Injunction. (See Dkt. Nos. 29, 29-1 at § VII.E (proposed preliminary injunction
 25 includes requirement for the permanent receiver “to make an accounting, as soon as practicable,
 26 to this Court and the Commission of the assets and financial condition of SB Capital, IPF, and
 27 SPF, and to file the accounting with the Court and deliver copies thereof to all parties.”) The

1 forensic accounting will be critical to assisting the Court in its management of the receivership
 2 and this case, and Feathers provides no good cause for it to be stayed.

3 **II. PROCEDURAL BACKGROUND**

4 The Commission filed this action on June 21, 2012, and alleged that Feathers and the
 5 firm he controlled, SB Capital were violating the federal securities laws in connection with two
 6 mortgage funds they managed –IPF and SPF. The Commission alleged that SBC Capital and
 7 Feathers were unregistered broker-dealers who ran the Funds as a Ponzi-like scheme and
 8 misused Fund assets, among other allegations. (See, e.g., Dkt. Nos. 1 (Complaint), 7 (Plaintiff's
 9 Memorandum in Support of Temporary Restraining Order and Other Relief).) On June 26,
 10 2012, the Court found that the Commission had established a *prima facie* case that defendants
 11 had violated the federal securities laws, and issued a temporary restraining order against all
 12 Defendants, an asset freeze, and the appointment of a temporary receiver. (See Dkt. No. 16
 13 (TRO).) With Feathers' consent, the Court subsequently entered a preliminary injunction
 14 against and appointed a permanent receiver. (See Dkt. Nos. 29 (Consent) and 34 (Preliminary
 15 Injunction and Orders) at 1.)

16 On August 24, 2012, Feathers answered the Complaint and asserted six affirmative
 17 defenses. (Dkt. No. 59.) On October 9, 2012, the Court issued a Case Management Order
 18 which set a fact discovery cutoff of March 1, 2013, other discovery deadlines after that date, and
 19 a Preliminary Pretrial Conference for April 12, 2013. (Dkt. No. 76.)

20 On or about November 9, 2012, Feathers filed several motions seeking modifications to
 21 the temporary restraining order and the order establishing a temporary receivership. *See* Dkt.
 22 Nos. 102-105.) All four motions were filed on an *ex parte* basis. In an Order Re: Defendant
 23 Mark Feathers' Pending Motions, filed November 13, 2012, the Court denied all *ex parte* relief
 24 sought by these, and other, motions. With regard to four other motions, the Court ordered the
 25 clerk to set them for hearing, and with regard to Docket Nos. 102 to 105, the Court permitted
 26 Feathers to re-file them as regularly noticed motions.

1 On the following day, November 14, 2012, Feathers re-filed Docket Nos. 102 to 105, and
 2 the motions were assigned Docket Nos. 109 to 112. Feathers did not obtain a hearing date prior
 3 to filing the motions.

4 At a status conference held on December 14, 2012, the Court set Docket Nos. 109 to 112
 5 for hearing on February 22, 2013. The Court also set a briefing schedule, and required the
 6 Commission to file any responses to Docket Nos. 109 to 112 on January 14, 2013, and Feathers
 7 to file any replies on January 28, 2013.

8 **III. ARGUMENT**

9 **A. Feathers Is Not “Attorney-in-Fact” for Investors in IPF and SPF**

10 In the motion, Feathers claims to be acting as “the true and lawful attorney-in-fact” for
 11 the investors in the two Funds, which are managed by defendant SB Capital. In support of that
 12 claim, Feathers quotes from an unidentified document(s) which designate the “manager” as the
 13 “true and lawful attorney-in-fact” for the investors, and apparently claims to himself personally
 14 the rights and duties of the manager.

15 In fact, Feathers individually is not, and never was, the “Manager” of any of the Funds.
 16 The IPF offering documents identified the corporate entity defendant SB Capital as the
 17 “Manager, Loan Originator and Loan Servicer.” (*See, e.g.*, Susan Hannan Declaration (Dkt. No.
 18 9), Exhibits 1, 2, 3, and 4.) Similarly, the IPF Operating Agreements identify the “Manager” as
 19 “Small Business Capital Corp., a California corporation....” (*Id.* at Exhibits 8, 9, 10, and 11.)
 20 Similarly, the SPF offering documents identified SB Capital as the “Manager,” as did the SPF
 21 Operating Agreements. (*Id.* at Exhibits 5, 6, 7, 12, 13, 14.)

22 SB Capital, and not Feathers, was given the powers referred to in Feathers’ motion. The
 23 Receiver now possesses all the rights and powers of SB Capital. (*See* Preliminary Injunction and
 24 Appointment of Permanent Receiver (Dkt. No. 34). Feathers personally was never the
 25 beneficiary of the “attorney-in-fact” designation to which he refers, and should refrain from
 26 putting himself forward as somehow acting in that capacity. Indeed, such conduct may well be
 27 in contravention of other provisions of the Preliminary Injunction, such as paragraphs IX and X.

1 Feathers has no rightful claim that he has any powers as “attorney-in-fact” for the
 2 investors in IPF and SPF, and the Court should reject such claims.

3 **B. Feathers Has Not Provided Any Basis For Modification of the Court’s Order**
 4 **Denying Request For Legal Expenses**

5 Feathers seeks an unspecified award of legal fees in his capacity as true and lawful
 6 attorney-in-fact for the investors, to pursue violations of the constitutional rights of the three
 7 hundred, or more, investors in IPF, SPF, as well as on behalf of SB Capital and Feathers himself.
 8 (Motion at 4:13-18.) Feathers also asks the Court for permission to engage legal counsel that is
 9 qualified and experienced in the areas of constitutional and securities law to assist Feathers in
 10 protecting the income and assets of the receivership estate from the “unwarranted and harmful
 11 actions of the plaintiff and the receiver.” (*Id.* at 5:15-23.)

12 Based upon the provisions of the Preliminary Injunction and the fact that Feathers is not,
 13 as he claims, “attorney-in-fact” for the members of IPF and SPF, the Commission would oppose
 14 any actions by Feathers to purport to represent IPF, SPF, or SB Capital, which are all entities in
 15 the receivership. The receiver operates under the supervision of the Court, and as an arm of the
 16 Court. The receiver, under the direction of the Court, is well situated to protect the interests of
 17 the investors that were defrauded by defendants.

18 The Commission does not object to Feathers obtaining counsel to represent him
 19 personally in this action, or in any other actions that he wishes to pursue, pursuant to the Order
 20 Denying Request for Legal Expenses issued by the Court on September 26, 2012. Indeed, the
 21 Commission would be willing to consider whether, depending on the circumstances, it might not
 22 oppose some modification to that Order. However, Feathers has not identified any qualified
 23 attorney in his papers, or asked for any specific award of legal fees. As such, Feathers’ motion
 24 is not ripe for decision. In addition, Feathers has not presented good cause for modification of
 25 the Court’s prior Order, and for that reason, his request should be denied.

1 **C. Feathers Has Not Provided Good Cause For The Court To Stay The**
 2 **Receiver's Activities**

3 Feathers does not provide good cause for his request to stay the receiver's authority to
 4 sell or dispose of assets, or to enter into any binding contractual agreements. In fact, the receiver
 5 would take such action only after notice and opportunity to be heard, and with Court approval.
 6 There is no need for the Court to issue the requested relief.

7 In that regard, the Commission notes that Feathers has filed a different motion in which
 8 he seeks to compel the receivership estate to fund a project (*see* Dkt. No. 111), and in a different
 9 motion seeks to compel the receivership estate to join a lawsuit (*see* Dkt. No. 156). As with any
 10 significant actions to be taken by the receiver, whether or not the receiver should take those
 11 actions is also subject to review and approval by the Court.

12 Feathers also requests that the Court stay the receiver's forensic accounting, although
 13 Feathers fails to provide good cause for his request. In the receiver's First Status Report and
 14 Inventory, filed July 9, 2012, the receiver outlined the assets and liabilities of the receivership
 15 entities and preliminarily determined that while investors were owed principal of approximately
 16 \$46.083 million, the receivership entities had assets of only about \$34.123 million, leaving a
 17 likely shortfall of \$11.960 million. (See Receiver's First Status Report and Inventory (Dkt. No.
 18 30) at 9:1-15.) This first report, and subsequent reports, provided the Court with valuable
 19 information about the assets of the receivership entities and the operations of the businesses
 20 before the receiver was appointed. The receiver is set to file his forensic accounting report on
 21 January 15, 2013, which may in any event moot Feathers' request. However, to the extent the
 22 receiver may need additional time to complete the forensic accounting, such accounting will
 23 provide valuable information for the Court and the parties.

24 Indeed, Feathers' request to stay the forensic accounting is somewhat at odds with his
 25 various contentions of wrongful conduct by the Commission and his claims of innocence. If
 26 Feathers, in fact, was not operating a Ponzi-like scheme and was not misusing investor funds to
 27 pay the operating expenses of SB Capital in violation of the representations made to investors,

1 then the forensic accounting by the receiver should substantiate Feathers' defenses and refute the
 2 Commission's charges. Moreover, because the receiver is an arm of the Court, was appointed by
 3 the Court, and functions under the Court's supervision, if the facts uncovered by the receiver
 4 support Feathers' innocence, then such a report would serve Feathers' interests and provide
 5 strong exculpatory evidence for him. It is therefore unclear why Feathers seeks to stop the
 6 forensic accounting.

7 Feathers has not provided good cause for the Court to stay any of the receiver's
 8 activities, and this request should be denied.

9 **D. Feathers Makes Other Arguments That Do Not Support The Relief Sought**

10 In support of the motion, Feathers makes a wide assortment of arguments and
 11 unsubstantiated allegations against the Commission, or the Commission and the Receiver,
 12 Thomas A. Seaman, many of which assert serious violations of the law without any factual or
 13 evidentiary support. However, whether considered separately or in combination, these various
 14 arguments do not support either an award of legal fees or imposition of a stay upon some or all
 15 of the receiver's activities. Moreover, Feathers fails to provide any factual basis for many of his
 16 claims of wrongdoing by the Commission, or the receiver, made in this motion.

17 Defendant repeats many arguments in this motion that he makes in other motions he has
 18 filed with the Court, and which the Commission addressed in oppositions to those other motions.
 19 *See, e.g.*, Feathers' (i) Motion to Dismiss under F.R.C.P Rule 12(b) (2), (3), (4), (5), and (6),
 20 F.R.C.P 8(d) and F.R.C.P 9(a)1(b) (Dkt. No 92), (ii) F.R.C.P Rule 12(b) Motion to Dismiss for
 21 Cause (Dkt. No. 93), and (iii) Motion to Dismiss the Receiver (Dkt. No.94); and Plaintiff's
 22 Omnibus Opposition to those motions (Dkt. No. 118).

23 Feathers asserts that the Commission and the Receiver "with *scienter*, have submitted
 24 false and misleading statements to the court" (Motion at 4:13-14); and "with *scienter*, have
 25 failed to submit required evidentiary information to demonstrate cause" (id. at 4:19-21).
 26 Feathers provides absolutely no factual or evidentiary basis for such serious allegations,
 27 particularly allegations that the Commission acted "with *scienter*." Feathers also claims that un-

1 named senior employees of the Commission “are likely in violation of the Agency’s own Office
 2 of Inspector General’s (OIG) Guidelines” (*id.* at 15:16-16:21). Again, defendant provides no
 3 factual basis or evidentiary support for such a potentially serious charge. Given that Feathers
 4 provides no evidence to support his claims, the Commission is not in a position to respond to
 5 these charges.

6 Feathers asserts various constitutional violations by the Commission and the Receiver
 7 (*id.* at 5:25-9:19, and 15:4-14), and the Commission addressed similar arguments in its Omnibus
 8 Opposition filed November 19, 2012, and incorporates them herein by reference.

9 Feathers complains about inquiries into his conduct by the Federal Bureau of
 10 Investigation (*id.* at 12:5-14:11). The Supreme Court recognized in *United States v. Kordel*, 397
 11 U.S. 1, 11 (1970) that parallel civil and criminal proceedings are appropriate and constitutional.
 12 As the Court of Appeals for the D.C. Circuit stated in *SEC v. Dresser*, 628 F.2d 1368, 1377
 13 (D.C. Cir. 1980), “effective enforcement of the securities laws require that the SEC and [the
 14 Department of] Justice be able to investigate possible violations simultaneously.” *See also SEC*
 15 *v. First Financial Group of Texas*, 659 F.2d 660, 666-67 (5th Cir. 1981) (“The simultaneous
 16 prosecution of civil and criminal actions is generally unobjectionable.”); *United States v.*
 17 *Stringer*, 521 F.3d 1189, 1191 (9th Cir. 2008) (“There is nothing improper about the government
 18 undertaking simultaneous criminal and civil investigations. . . .”). Moreover, Congress expressly
 19 provided that the Commission can share information gathered in a civil investigation with other
 20 government agencies and provide information to the Department of Justice for a determination
 21 whether to institute criminal proceedings. *See* Section 20(b) of the Securities Act of 1933, 15
 22 U.S.C. § 77t(b); Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(d). *See*
 23 *also* 17 C.F.R. § 240.24c-1 (the Commission’s regulation concerning access to nonpublic
 24 information, which specifically allows it to provide nonpublic information to, among others, a
 25 “federal, state, local or foreign government or any political subdivision, authority, agency or
 26 instrumentality of such government.” *See* 240.24c-1(b)(1)).

1 Feathers also argues that the asset freeze may be causing negative feelings among
 2 investors in IPF and SPF. (Motion at 14:13-15:2.) It is unclear how such hard feelings justify
 3 any of the relief requested by Feathers.

4 Other than as addressed above and in other pleading filed by the Court, and unless
 5 otherwise ordered by the Court, the Commission will not attempt to address Feathers' varied and
 6 unsubstantiated allegations of wrongdoing that are not germane to the relief requested,
 7 specifically payment of legal fees and a stay of certain actions by the Receiver without further
 8 Court order.

9 **IV. CONCLUSION**

10 Therefore, the Commission respectfully requests that the Court deny Defendant
 11 Feathers's motion seeking the payment of legal fees and the stay of the Receiver's dissipation of
 12 assets (Dkt. No. 109), and to grant any other relief that is appropriate.

13 DATED: January 14, 2013

14 Respectfully submitted,

15 */s/ Susan F. Hannan* _____

16 John B. Bulgozdy
 17 Susan F. Hannan
 18 Attorneys for Plaintiff
 SECURITIES AND EXCHANGE COMMISSION

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is:

U.S. SECURITIES AND EXCHANGE COMMISSION, 5670 Wilshire Boulevard, 11th Floor, Los Angeles, California 90036-3648 Telephone No. (323) 965-3998; Facsimile No. (323) 965-3908.

On January 14, 2013, I caused to be served the document entitled **PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANT MARK FEATHERS [PROPOSED] AMENDMENT TO AMENDED TEMPORARY RESTRAINING ORDER AND ORDERS [Dkt. No. 109]**

on all the parties to this action addressed as stated on the attached service list:

OFFICE MAIL: By placing in sealed envelope(s), which I placed for collection and mailing today following ordinary business practices. I am readily familiar with this agency's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the U.S. Postal Service on the same day in the ordinary course of business.

HAND DELIVERY: I caused to be hand delivered each such envelope to the office of the addressee as stated on the attached service list.

UNITED PARCEL SERVICE: By placing in sealed envelope(s) designated by United Parcel Service ("UPS") with delivery fees paid or provided for, which I deposited in a facility regularly maintained by UPS or delivered to a UPS courier, at Los Angeles, California.

ELECTRONIC MAIL: By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

E-FILING: By causing the document to be electronically filed via the Court's CM/ECF system, which effects electronic service on counsel who are registered with the CM/ECF system.

FAX: By transmitting the document by facsimile transmission. The transmission was reported as complete and without error.

I declare under penalty of perjury that the foregoing is true and correct.

Date: January 14, 2013

/s/ Javier Delgadillo
Javier Delgadillo

SEC v. SMALL BUSINESS CAPITAL CORP,et al.
United States District Court – Northern District of California
San Jose Division
Case No. 5:12-CV-03237-EJD
LA-4141

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